

**STATE OF WISCONSIN
Department of Commerce**

In the Matter of the PECFA Appeal of-

Glenn Hoffmann
Hatley Veneer, Inc.
701 Emmons ville Road
Hatley, Wisconsin 54440

PECFA Claim #54440-9717-01
Hearing #98-114

Final Decision

Preliminary Recitals

Pursuant to a Petition for Hearing filed July 24, 1998, under § 101.02 (6) (e) Wis. Stats., and § Comm/ILHR 47.53 Wis. Adm. Code, to review a decision of the Wisconsin Department of Commerce (Department), a hearing was commenced on August 11, 1999, at Madison, Wisconsin. A Proposed Hearing Officer Decision was issued on November 5, 1999, and the parties were provided a period of twenty (20) days to file objections.

The Issue for determination is:

Whether the Department's decision of June 25, 1998, denying reimbursement to the Appellant for a portion of the costs which it incurred in its investigation and remediation effort at the site which is the subject of this appeal was correct.

There appeared in this matter the following persons:

PARTIES IN INTEREST:

Glenn Hoffman
Hatley Veneer, Inc.
701 Emmons ville Road
Hatley, Wisconsin 54440

By: Russell W. Wilson, Esq.
Ruder, Ware & Michler
500 Third Street, Suite 700
Post Office Box 8050
Wausau, Wisconsin 54402-8050

Wisconsin Department of Commerce
PECFA Bureau
201 W. Washington Avenue
P.O. Box 7838
Madison, Wisconsin 53707-7838,

By: Kelly Cochrane, Esq.
Assistant Legal Counsel
Wisconsin Department of Commerce
201 W. Washington Avenue, Room 322A
P.O. Box 7838
Madison, Wisconsin 53707-7838

The authority to issue a Final Decision in this matter has been delegated to the undersigned by the Secretary of the Department pursuant to § 560.02 (3) Wis. Stats.

The matter now being ready for Final Decision I hereby issue the following:

FINDINGS OF FACT

The Findings of Fact in the Proposed -Hearing Officer Decision cited above are hereby adopted for purposes of this Final Decision.

CONCLUSIONS OF LAW

The Conclusions of Law in the Proposed Hearing Officer Decision cited above are hereby adopted for purposes of Final Decision.

DISCUSSION

The Discussion in the Proposed Hearing Officer Decision cited above is hereby adopted for purposes of Final Decision.

FINAL DECISION

The Proposed Hearing Officer Decision cited above is hereby adopted as the Final Decision of the Department.

NOTICE TO PARTIES

Request for Rehearing

This is a final agency decision under § 227.48 Wis. Stats. If you believe this decision is based on a mistake in the facts or law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Office of Legal Counsel, Wisconsin Department of Commerce, 201 West Washington Avenue, P.O. Box 7970, Madison, Wisconsin 53707-7970.

Send a copy of your request for a new hearing to all the other parties named in this Final Decision as "PARTIES IN INTEREST".

Your request must explain what mistake you believe the hearing examiner made and why it is important or you must describe your new evidence and tell why you did not have it available at the hearing in this matter. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request for a new hearing will be denied.

Your request for a new hearing must be received by the Department's Office of Legal Counsel no later than twenty (20) days after the mailing date of this Final Decision as indicated below. Late requests cannot be reviewed or granted. The process for asking for a new hearing is set out in § 227.49 Wis. Stats.

Petition For Judicial Review

Petitions for judicial review must be filed not more than thirty (30) days after the mailing of this Final Decision as indicated below (or thirty (30) days after the denial of a request for a rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, office of the Secretary, Wisconsin Department of Commerce, 201 West Washington Avenue, P.O. Box 7970, Madison, Wisconsin 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" or each party's attorney of record. The process for judicial review is described in § 227.53 Wis. Stats.

Dated: 6/22/00

Martha Kerner
Executive Assistant
Wisconsin Department of Commerce
201 West Washington Avenue
P.O. Box 7970
Madison, Wisconsin 53707-7970

Copies to: Above identified "PARTIES IN INTEREST", or their legal counsel if represented.

Joyce Howe, Office Manager
Unemployment Insurance Hearing Office
1801 Aberg Avenue, Suite A
Madison, Wisconsin 53707-7975

Date Mailed: 6/22/00

Mailed By: Henrietta Patterson

**STATE OF WISCONSIN
DEPARTMENT OF COMMERCE**

IN THE MATTER OF: The claim for
reimbursement under the PECFA
Program by

Glenn Hoffmann
Hatley Veneer Inc.

MADISON HEARING OFFICE
1801 Aberg Ave., Suite 'A
P.O. Box 7975
Madison, WI 53707-7975
Telephone: (608) 242-4818
Fax: (608) 242-4813

Hearing Number: 98-114

Re: PECFA Claim # 54440-9717-01

PROPOSED HEARING OFFICER DECISION

NOTICE OF -RIGHTS

Attached are the Proposed Findings of Fact, Conclusions of Law, and Order in the above-stated matter. Any party aggrieved by the proposed decision must file written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to Madison, Hearing Office, P.O. Box 7975, Madison, WI 53707-7975. After the objection period, the hearing record will be provided to Terry W. Grosenheider, Executive Assistant of the Department of Commerce, who is the individual designated to make the FINAL decision of the department in this matter.

STATE HEARING OFFICER:

Karen L. Godshall

DATED AND MAILED:

November 5, 1999

MAILED TO:

Appellant Agent or Attorney

Attorney Russell W. Wilson
Ruder, ware & Michler
500 Third St. #700
Wausau, WI 54402-8050

Department of Commerce

Kelly Cochrane
Assistant Legal Counsel
P.O. Box 7838
Madison, WI 53707-7838

**STATE OF WISCONSIN
DEPARTMENT OF COMMERCE**

In the matter of the

Claim for Reimbursement under
The Provisions of the PECFA Program by

Glenn Hoffmann
Hatley Veneer Inc.
701 Emmonsville Road
Hatley WI 54440

PECFA Claim #54440-9717-01
Hearing No. 98-114

A decision of the department regarding the Petroleum Environmental Cleanup Act (PECFA) was issued on June 25, 1998, denying reimbursement for certain portions of the appellant's claim. The appellant filed a timely appeal on July 24, 1998. A hearing on the appellant's appeal was held on August 11, 1999, before Administrative Law Judge Karen L. Godshall. Following the hearing, written briefs were received from the appellant and the respondent department. The matter is now ready for a proposed decision.

PROPOSED FINDINGS OF FACT

In June of 1993, a new municipal water and sewer system, including a municipal well, piping and waste treatment plant, was being constructed for the Village of Hatley, Wisconsin. The project required the construction of a number of dewatering wells around the area in which the pipes were being laid, in order to depress the groundwater level and allow digging to progress. On June 13, 1993, as workers were digging in open trenches on the project, a strong odor of gasoline was discovered. An individual who had previously worked on village projects was called to the site and asked for his opinion. At that time, the concerns were the health and safety of the project workers, and the possible pipe degradation and well contamination which could result from the presence of gasoline in the soil and water. A further consideration was the proximity of the project to the Plover River. Shortly after the gasoline was discovered, the Wisconsin Department of Natural Resources became involved in the project. At that point, the source of the gasoline contamination was unknown. The property of the appellant, Hatley Veneer, was later determined to be the source.

When the contamination was discovered, the Department of Natural Resources (DNR) suggested shutting down the dewatering wells to the north of the apparent contamination site. When those wells were shut down, however, and the southern wells continued to operate, there was a concern that the contamination would be drawn towards the southern wells. It was decided to attempt to complete the water and sewer project as quickly as possible, using overtime labor and other costly alternatives. It was also decided to upgrade the pipe material being used in the construction project from PVC to ductile iron, to avoid the possibility of future damage to PVC piping by any residual contaminants. The village and the other parties involved hoped that the project could be completed without drawing the contamination further and that neither the nearby private wells nor the new public system or the nearby river would be contaminated.

The appellant eventually submitted a PECFA claim to the department for costs associated with the contamination and cleanup. Portions of the claimed reimbursement were denied for various reasons. Among the costs denied, the appellant seeks payment for the following: \$6769.50 in payment to Schneider Consultants, Inc., which was denied on the bases that the consultant was not a registered PECFA consultant, that certain charges were not documented, and that reimbursement for overtime charges could not be allowed; \$13,133.06 in payment to PTS Contractors, Inc., for costs which the department considered to be outside the scope of the program; \$489.66 in payment to ECCI which included a mileage overcharge, a PID overcharge, and charges over standard for bailers; a second payment to ECCI for \$438.25, denied on the same bases as above and also including excessive transportation charges and charges for meals for which no receipts were provided; \$895.00 in payments to Enviroscan for rush lab charges; and interest on the above disputed amounts.

(After hearing on this matter, by means of its post-hearing brief, the appellant withdrew its request for reimbursement of several of the above payments, including the nonreceipted meals, the excess mileage charges and the rental of a photoionization unit, totaling \$398.11. Those amounts are no longer in dispute.)

APPLICABLE STATUTES AND REGULATIONS (excerpted)

Sec. ILHR 47.015(12) "Emergency or emergency action" means a situation which requires an immediate response to protect public health or safety. Simple removal of contaminated soils, recovery of free product or financial hardship are not considered emergencies. An emergency action would normally be expected to be directly related to a sudden event or discovery.

Sec. ILHR 47.03(2) Emergency awards. The department may, after determining that an emergency exists, make an award in advance of claims received prior to the emergency claim. The finding of an emergency shall be made based upon an immediate need to protect public health or safety. The finding of an emergency may not be based upon financial hardship of the responsible party or its agent. A determination that no emergency exists may not be appealed to the department.

Sec. ILHR 47.30(2) Exclusions from eligible costs the following costs may not be reimbursed:

(a) Costs determined to be unrelated to remedial action activities under the scope of this chapter:

5. Any overtime labor charge, excluding an emergency action, billed at other than a straight time rate;
9. Costs associated with environmental audits, environmental reconnaissance or real estate transactions, construction projects, new construction or long-term loan transactions;
12. Laboratory rush charges, priority mail or priority shipping fees unless related to an approved emergency action;
15. Other costs that the department determines to be associated with, but not integral to, the remediation of a petroleum project discharge from a petroleum product storage system or home oil tank system.

(b) Costs related to improper or incompetent remedial activities or services:

4. Any costs associated with actions that exceed the necessary activities to bring a site to the required level of remediation;
5. Costs associated with the repair or replacement of damaged buildings, sewer lines, water lines, electrical lines, phone lines, fiber optic lines or other utilities on the property;
- (d) Costs associated with tank system upgrades or retrofits, requirements for complying with other state or federal rules or laws, and future business plans:
2. Costs associated with capital improvements, reinstallation of electrical, dispensers, pumps, or other items for retrofits, upgrades or new construction;
4. Expenditures required by the DNR or the department in order to meet the groundwater protection standards ... or other administrative rules but not related to a petroleum product discharge under this chapter;
5. Costs associated with loss of business.

Wisconsin Statutes, Sec. 101.143(3)(g) Emergency situations. Notwithstanding pars. (a)3 and (c)1. And 2., an owner or operator or the person may submit a claim for an award under sub. (4) after notifying the department under par. (a)3., without completing an investigation under par. (c)1. And without preparing a remedial action plan under par. (c)2. If any of the following apply:

1. An emergency existed which made the investigation under par.(c)1. And the remedial action plan under par. (c)2. Inappropriate.
2. The owner or operator or the person acted in good faith in conducting the remedial action activities and did not willfully avoid conducting the investigation ... or the remedial action plan....

PROPOSED DISCUSSION and CONCLUSIONS OF LAW

The appellant seeks to have its full costs (as summarized above) reimbursed on the basis that its excess costs were warranted due to the existence of an emergency at the project site. The statutes and rules do provide in certain circumstances that costs, which would otherwise be considered excessive, may be reimbursed in an emergency situation. The appellant's witnesses expressed their views that an emergency existed based upon the threats to public health and safety. The appellant has the burden of proving its position on that issue. It has failed to do so. While there were references by various consultants and third parties to the situation as an "emergency", none of the responsible parties, during the course of the investigation or remediation, ever advised the department that they considered an emergency to exist, nor did they seek a ruling or declaration from the department that an emergency existed. The first attempt to have the situation characterized as an emergency for purposes of defining the appropriate reimbursement rules did not occur until early 1998, in correspondence to the claims reviewer. In addition, the appellant has not provided any basis for its apparent argument that an emergency declaration may be made retroactively, based upon the good faith actions of the parties or on any other basis. The statutory provisions in section 101.143(3)(g) deal with parties acting in an emergency without the otherwise required action plan and remediation approval, but do not provide any support for the argument that otherwise excessive costs may be reimbursed because of such "good faith" actions. Finally, the evidence offered by the appellant's witnesses does not establish that there was such an immediate threat to public health or safety, above and beyond the threat otherwise associated with any

similar contaminant release, or that any such threat could not have been dealt with by proceeding in a more cautious fashion with the municipal construction project. Therefore, any review of the specific charges denied by the claims reviewer must be conducted without reference to any alleged "emergency".

The specific charges deemed nonreimbursable by the initial decision of the claims reviewer will be addressed in the order they are listed above. The first such disputed amount is the Schneider Consultants payment of \$6769.50. The evidence at hearing established that Schneider was not a PECFA registered consultant, but was the general contractor on the overall municipal project. It appeared reasonable for it to take the lead in certain aspects of the investigation and cleanup, once the contamination was discovered. The appellant argues that its costs should be allowed under the exception that provides for payment if "the department determines that denying reimbursement would conflict with the achievement of the goals of the PECFA program". The appellant has not shown that the goals of the program require reimbursement of this otherwise ineligible cost. In addition, portions of the Schneider payment are also nonreimbursable because they are overtime charges or are undocumented charges.

The PTS Contractors Inc. cost was disallowed to the extent that the cost represented an upgrade from PVC piping to ductile iron piping. That cost was not integral to the cleanup or remediation project and represented an upgrade for the new sewer and water installation. As such, the costs were not eligible for reimbursement under ILHR 47.30(2), which is summarized above.

The appellant, as already noted, is no longer contending that it is eligible for reimbursement of the mileage, meal or photoionization device costs that were initially included in its appeal. The remaining costs that it seeks to have reimbursed are, by its own admission, reimbursable only under emergency conditions, and it has not established that such conditions existed.

PROPOSED DECISION

The department's decision of June 25, 1998, denying reimbursement to the appellant for a portion of the costs which it incurred in the above-described investigation and remediation effort is affirmed. The appellant is not entitled to any further reimbursement of the amounts in dispute.

By

Karen L. Godshall
Administrative Law Judge